



EMPLOYMENT TRIBUNALS

Between:

Mrs L Innes
Claimant

and Mellors Catering Services Limited
Respondent

Heard at: Leeds **on:** 22 February 2022

Before: Employment Judge Cox

Representation:

Claimant: In person
Respondent: Did not attend – written submissions only

RESERVED JUDGMENT AFTER PRELIMINARY HEARING

The claim is dismissed, having been presented out of time.

REASONS

1. The Respondent provides catering services to schools. The Claimant works for the Respondent as a general kitchen assistant at Rawmarsh Community School. After a period of early conciliation through ACAS from 9 to 15 June 2021, she presented a claim to the Tribunal on 18 June 2021 alleging that the Respondent had failed to pay her the correct amount of holiday pay.
2. The Tribunal has to decide as a preliminary point whether it has power to deal with the claim in the light of the date on which it was presented and the time limits for such claims.
3. The time limit for presenting a claim of underpayment of holiday pay is slightly different according to how the claim is categorised. If it is viewed as a claim under the Working Time Regulations 1998 (WTR) that an employer had failed to pay a worker any part of the amount due to her for a period of leave under

Regulation 16(1) WTR, the claim must be made before the end of the period of three months beginning with the date on which it is alleged the payment should have been made (Regulation 30(2)(a)). The claim can proceed, however, if the Tribunal is satisfied that it was not reasonably practicable for the worker to present the claim by that date and she has presented it within a further period that the Tribunal considers reasonable (Regulation 30(2)(b)).

4. If the claim is viewed as a claim that the employer has made an unauthorised deduction from the worker's wages (which includes holiday pay), the claim must be made before the end of the period of three months beginning with the date of payment of the underpayment or, if there is a series of underpayments, before the end of the period of three months beginning with the last underpayment in the series (Section 23(3) of the Employment Rights Act 1996 – the ERA). If the Tribunal is satisfied that it was not reasonably practicable for the worker to present the claim by that date, the claim can still proceed if the Tribunal accepts that it was made within a further period the Tribunal considers reasonable (Section 23(4) ERA).
5. In either case, the legislation extends the time limit for bringing a claim to allow for the period of early conciliation through ACAS, but only if the worker contacted ACAS to start the early conciliation process within the three month time limit (see Regulation 30B WTR and Section 207B ERA).
6. At the Preliminary Hearing, the Claimant confirmed that the dates on which she believed she had not been paid the correct holiday pay were during periods of furlough in March to September 2020 and 23 October to 3 November 2020. For the purposes of establishing whether the claim has been presented in time, the Tribunal views this as an alleged series of unauthorised deductions from wages ending with the Respondent's payday for the period to 3 November 2020, which was 13 November 2020. As the Claimant did not contact ACAS under the early conciliation procedure until 9 June 2021, the period of early conciliation does not extend the time limit for her claim. Her claim should have been presented by 12 February 2021. It was not in fact made until over four months later.
7. It is for the Claimant to establish that it was not reasonably feasible for her to present her claim within the usual three-month time limit. The fact that a Claimant does not know of her right to bring a claim or the time limit for bringing it does not mean it was not reasonably feasible for her to present the claim, unless it was reasonable for her not to know about her right and the time limit. The Tribunal takes judicial notice of the fact that information about the right to holiday pay and how to enforce it is readily available on the internet including, for example, on Government and ACAS websites that are authoritative, free, and easy to access.

8. On 21 September 2021, the Tribunal directed the Claimant to provide a statement setting out her evidence on why her claim was not presented earlier 14 days before the Preliminary Hearing. On 26 November 2021 that direction was varied to require the Claimant to provide her statement 28 days in advance of the Hearing. The Claimant wrote to the Tribunal on 9 January 2022 and explained that in August 2020 she had quizzed her manager about why she had not received holiday pay. She also stated that she did not understand her pay slips. At the Preliminary Hearing, the Claimant gave further, oral evidence about the circumstances surrounding her claim. On the basis of that letter and oral evidence, the Tribunal makes the following findings.
9. The Claimant initially worked for the Respondent under a zero hours contract, but she was furloughed from March to September 2020. In August 2020, she was offered and accepted a contract to work 16 hours a week from the beginning of the autumn term. At this time, she Googled her right to holiday pay and spoke to her cousin, who at the time was working as a volunteer adviser at the Citizens Advice Bureau. Her cousin told her that she was entitled to paid at her full rate of pay for her basic 5.6 weeks' holiday entitlement. The Claimant queried with her manager why she had not been getting holiday pay, at least for the Bank Holidays, and her manager spoke to someone within the Respondent about it. She reported back that the Claimant was not entitled to holiday pay while she was furloughed.
10. The Claimant thought no more about it until she was furloughed again during the school's half-term break from 23 October to 3 November 2020. By this time, she was on a 16-hour a week contract, where her pay included an element of holiday pay, and she felt she should be receiving holiday pay at the full rate for this time also. She and her colleagues discussed the issue and they all felt that they had not been paid correctly. The Claimant raised it with her manager again, who agreed that it did not seem right but said that she did not know what to do about it. The manager spoke to someone in the company, but the Claimant does not know what they told her. At around the end of February or beginning of March 2021 the Claimant spoke to her cousin again, who said that they should either take it higher up in the company or take a Tribunal case. Her cousin mentioned time limits and said that they might be out of time already.
11. Eventually, the Claimant and her colleagues decided that they would "go for it" and make a claim of their own. Although the Claimant's colleagues had initially been concerned for their job security if they made a claim, when they found out that the Respondent had made payouts to people working at different sites they agreed with the Claimant's suggestion that it was worth a try for them to bring their own claim. On 9 June they contacted ACAS and on 18 June they brought their claim.

12. The Tribunal does not accept that it was not reasonable feasible for the Claimant to have presented a claim within the three-month time limit. She believed throughout that she was not being paid the right amount and queried it with her manager, who agreed with her that it did not seem right. She had researched her rights on the internet, from which she could reasonably have been expected to learn about not only the right to holiday pay but also the time limit for a Tribunal claim. Further, she had access to advice from her cousin, who expressly told her about the time limit. Even after her conversation with her cousin, the Claimant did not present her claim for several weeks. Even if her colleagues were reluctant to make a claim, it was reasonably feasible for the Claimant to bring an individual claim on her own behalf.
13. As the Tribunal is not satisfied that it was not reasonably practicable for the Claimant to present her claim in time, the claim must be dismissed.

Employment Judge Cox
Date: 25 February 2022